(12)

No. 91-1200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CITY OF CINCINNATI,
Petitioner,

v.

DISCOVERY NETWORK, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF *AMICI CURIAE* OF AMERICAN ADVERTISING FEDERATION, AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, DIRECT MARKETING ASSOCIATION, THE MEDIA INSTITUTE, AND NATIONAL ASSOCIATION OF BROADCASTERS IN SUPPORT OF RESPONDENTS

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This brief is respectfully submitted, pursuant to Rule 37 of the Rules of the Court, urging affirmance of the decision below of the United States Court of Appeals for the Sixth Circuit on the grounds that the ordinance at issue herein impermissibly discriminates against truthful commercial speech, and that the First and Fourteenth Amendments to the Constitution of the United States therefore bar Petitioner's action.[1]

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[1] Counsel for both Petitioner and Respondents have consented to the participation of *amici* in this case, as evidenced in letters filed with the Court.

INTEREST OF *AMICI CURIAE*

Together, the *amici* herein represent thousands of advertising agencies, advertisers, broadcasters, publishers, and others who participate in the advertising industry, as well as individuals interested in preserving freedom of speech. It is from this broad-based, national perspective that the *amici* present their views to the Court. The precedent set by this case could directly affect the constitutional interests of the *amici* both by curtailing the outlets for truthful commercial speech about lawful products and services and by undermining the financial ability of the *amici* to engage in fully protected, noncommercial speech. *Amici* are:

- The American Advertising Federation ("AAF"), a national trade association that represents virtually all elements of the advertising industry. Among AAF's members are companies that produce and advertise consumer products, advertising agencies, magazine and newspaper publishers, radio and television broadcasters, outdoor advertising organizations, and other media. AAF members also include twenty-one national trade associations; more than 200 local professional advertising associations with 52,000 members; and more than 200 college chapters, with more than 6,000 student members. AAF members use almost all forms of media to advertise and communicate with consumers throughout the United States.
- The American Association of Advertising Agencies ("AAAA"), the national trade association of the advertising agency industry, which represents more than 750 advertising agencies located throughout the United States. Members of the AAAA create and place approximately 80% of all national advertisements, as well as significant portions of local and regional advertising. Most clients of AAAA members are businesses selling goods or services to the public. AAAA is dedicated to advancing the interests of the advertising industry and has actively

represented its members in connection with governmental efforts to restrict speech.

- The Direct Marketing Association ("DMA"), a non-profit corporation. DMA is the oldest and largest trade association serving the vast community in direct-to-the-consumer advertising and marketing. Its members are firms engaged in or associated with marketing goods and services through direct response methods, which include the use of catalogs and other printed materials distributed directly to consumers.
- The Media Institute (the "Institute"), an independent, non-profit research organization that advocates a strong First Amendment. The Institute has participated in select cases in federal circuit courts and the U.S. Supreme Court. In addition, it conducts research projects and sponsors publications relating to the First Amendment and other aspects of the communications media. The advocacy of the Institute here is unrelated to any of the financial or proprietary interests of the private-party participants.
- The National Association of Broadcasters ("NAB"), organized in 1922, which is a non-profit incorporated trade association serving and representing the nation's radio and television stations and all of the major networks. A substantial amount of the advertising broadcast by NAB members is national in scope and crosses state jurisdictional boundaries. In fact, because of the nature of the electromagnetic spectrum, individual station transmissions of local and national advertising cannot be confined within state boundaries.

SUMMARY OF ARGUMENT

As demonstrated at length in the opinion of the Sixth Circuit and the brief of Respondent Discovery Network, Inc., Cincinnati's newsrack ordinance cannot be upheld under the standards set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980). In particular, the city has failed to demonstrate a "reasonable fit" between its goal of advancing health and safety and the means it has employed to achieve that goal—*i.e.*, in an effort to remove a tiny percentage of Cincinnati's newsracks, it has imposed a sweeping ban on the distribution of certain types of speech, based solely on its commercial content.

Amici respectfully suggest, however, that the Court go beyond a conventional *Central Hudson* analysis and use this case to give fresh consideration to the basic premises of its treatment of commercial speech. Specifically, *amici* urge that the Court make clear that truthful commercial messages about lawful products and services are entitled to a full measure of constitutional protection. This approach would be: (1) consistent with the *outcome* in every Supreme Court case involving such speech since it decided *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), with a single errant exception;[2] and (2) fully in accord with the original understanding of the First Amendment, as reflected in its text and surrounding historical circumstances.

Moreover, such a determination would eliminate much of the confusion and inconsistency that now characterizes efforts by the lower courts to implement *Central Hudson's* subjective "balancing" test. In accord with these principles, the decision of the Sixth Circuit should be affirmed and the regulation in question invalidated.

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[2] The exception is *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), which rested on a narrow 5-4 majority and has been subjected to intense academic criticism. *See infra* note 6.

ARGUMENT

I. THE FIRST AMENDMENT PROHIBITS DISCRIMINATION AGAINST TRUTHFUL, NON-MISLEADING COMMERCIAL MESSAGES.

In *Virginia Pharmacy*, this Court properly recognized that "the free flow of commercial information is indispensable . . . to the proper allocation of resources in a free enterprise system" and to "the formation of intelligent opinion as to how that system ought to be regulated." 425 U.S. at 765. Since that time, however, the Court has adopted the four-part *Central Hudson* "balancing" test which goes beyond the questions of whether a commercial message is truthful and non-misleading and whether it concerns a lawful product or service. In its most recent iteration, that test seeks to assess whether the asserted governmental interest justifying the regulation is "substantial"; whether the regulation "directly advances" that interest; and whether it does so in a manner that is a reasonable "'fit' between the legislature's ends and the means chosen to accomplish those ends." *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480 (1989).

Fortunately, in the decisions of the Court to date, this test has led to *results* that are consistent with a grant of full First Amendment protection to truthful advertising of lawful products and services. Accordingly, the approach advocated in this brief would not require substantial modification of previously approved governmental policies. More importantly, however, the proposed analysis would avoid the danger of unlawful censorship that will exist so long as commercial messages are formally subjected to a reduced level of constitutional protection—where the outcome of each case turns on the subjective evaluations of individual administrators, legislators, and judges. In addition, the adoption of a categorical approach would eliminate much of the confusion and inconsistency that has marked efforts by the lower courts to implement the existing four-part "balancing" test.

A. The Court's Jurisprudence Is Largely in Accord with the View That Truthful Commercial Messages Are Fully Protected by the First Amendment.

Virginia Pharmacy, 425 U.S. at 755, marked a recognition by the Court that, contrary to its previous statement in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), "purely commercial advertising" is entitled to constitutional protection. In *Valentine*, the Court had upheld a ban on the distribution in the streets of commercial advertising matter, 316 U.S. at 53. *Virginia Pharmacy*, however, thoroughly undercut *Valentine*.

Matters have now come full circle. As in *Valentine*, the Court will decide in this case whether a sweeping ban on the distribution of advertising materials in a public place is permissible. *Amici* urge the Court to reject such regulatory actions and to reaffirm the principle that truthful commercial messages may not be banned or regulated merely because they are commercial in nature.

1. *The outcome of the Court's decisions since* Virginia Pharmacy, *has, in every case but one, been consistent with the principle that truthful commercial messages about lawful products are entitled to a full measure of constitutional protection.*

This Court's commercial speech decisions since *Virginia Pharmacy* have generally upheld restrictions which ostensibly prevented consumers from being misled—while striking down numerous regulations on commercial communications which were designed to advance other purported governmental interests. For example, in *Friedman v. Rogers*, 440 U.S. 1 (1979), the Court upheld a statute banning the use of trade names by optometric offices on the ground that "there is a significant possibility that trade names will be used to mislead the public." *Id.* at 13. And in *Zauderer v. Off. of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), the Court approved a requirement that attorneys inform the public that they may be responsible for costs, if not legal fees,

if they hire a lawyer on a contingent fee basis: "We hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651 (footnote omitted).[3]

In *Ohralik v. Ohio State Bar Ass'n*, the Court noted "the common-sense distinction between speech proposing a commercial transaction . . . and other varieties of speech." 436 U.S. 447, 455-56 (1978). That distinction, embedded in the common law, permits broader regulation of the content of advertising to ensure its veracity. *See infra* pages 22-24.[4] Such regulations, however, are subject to review by the courts to ensure that the government is not using its police power to define commercial fraud and misrepresentation as a pretext to punish or censor truthful and lawful (protected) communications. In fact, this Court has fulfilled precisely such a role in most of its commercial speech cases.

Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983), exemplifies this approach. There, the Court held unconstitutional a statute prohibiting the mailing of unsolicited advertisements for contraceptives. It recognized that "regulation of commercial speech based on content is less problematic . . . [i]n light of the greater potential for deception or confusion in the context of certain advertising messages." *Id.* at 65. However, because the information provided by the advertisements was not misleading but informative, the messages were protected.

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[3] Similarly, the ban on in-person solicitation by lawyers upheld in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), was found to be constitutional because it prevented attorneys from taking commercial advantage of prospective clients who may be misled or deceived in the proposed transaction.

[4] For the purposes of this brief, it is assumed *arguendo* that the Court was correct in its decisions upholding restrictions on commercial speech asserted to be false or misleading. However, *amici* do not necessarily agree that the commercial communications at issue in each of these cases can fairly be characterized as having been false or misleading.

In fact, the majority of the Court's commercial speech decisions have recognized the value of truthful commercial speech. Thus, in *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91 (1990), the Court overturned the censure of an attorney who had stated on his letterhead that he had been certified as a civil trial specialist. Justice Stevens' plurality opinion reaffirmed the Court's commitment to "the principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information." *Id.* at 108. Similarly, in *Zauderer*, 471 U.S. at 647, the Court invalidated the reprimand of an attorney who had solicited business by running newspaper advertisements containing non-deceptive illustrations and legal advice.[5]

2. *The* Central Hudson *"balancing test" is susceptible to decisions inadequately protective of commercial messages; it also causes confusion among the lower courts.*

In explaining its actions, however, the Court has departed from this approach by frequently reiterating a broad assertion that "the Constitution . . . accords a lesser

[5] *See also, e.g., Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (truthful, nondeceptive letters sent to individuals known to face particular legal problems were constitutionally protected); *In re R.M.J.*, 455 U.S. 191 (1982) (rule limiting dissemination of truthful advertising violated First Amendment); *Central Hudson*, 447 U.S. 557 (1980) (regulation restricting non-deceptive advertisements promoting use of electricity violated First Amendment); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (truthful attorney advertising constitutionally protected); *Carey v. Population Services International*, 431 U.S. 678 (1977) (law restricting advertising of contraceptives violated First Amendment since it did more than limit misleading or deceptive speech); *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (ordinance prohibiting "for sale" signs violated First Amendment because it inhibits free flow of truthful information); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (editor could not be prosecuted for running non-deceptive advertisement for a legal service).

protection to commercial speech than to other constitutionally guaranteed expression," *Bolger*, 463 U.S. at 64-65, and by following the four-part *Central Hudson* test.

As the Court of Appeals demonstrated and as the brief of Respondent demonstrates, the City of Cincinnati has not shown that the ordinance at issue satisfies the requirements of this test. *See, e.g., SUNY v. Fox*, 492, U.S. at 480 (party seeking to uphold restriction on commercial speech carries burden of justifying it.). A total ban on all commercial newsracks does not accomplish the goal of beautifying the city where the number of newsracks that would be removed by enforcement of the ordinance is only sixty-two out of 1,500-2,000. In the words of the Sixth Circuit, "the burden placed on [Discovery] by Cincinnati's ordinance cannot be justified by the paltry gains in safety and beauty achieved by the ordinance." *Discovery Network, Inc. v. Cincinnati*, 946 F.2d 464, 471 (1991), *cert. granted*, 112 S. Ct. 1290 (1992).

The city's contention that a restriction on speech is valid as long as it furthers the asserted governmental interest to any extent, however "paltry" or "minuscule," Brief of Petitioner at 20, misconstrues *SUNY v. Fox*. A requirement that a regulation be a "reasonable fit" quite plainly calls for an assessment of the relative benefits and burdens of the restriction on speech, as well as for a judgment about the appropriateness of the law to the problem sought to be averted. Here, both the Court of Appeals and the District Court correctly found that the aesthetic value and the effect on safety of removing 3-4% of the newsracks from the streets did not justify an outright ban on the distribution of commercial speech.

Moreover, as shown at length below, there is no textual or historical justification for the *Central Hudson* test itself. This Court was correct in *Virginia Pharmacy* when it extended First Amendment protection to "concededly truthful information about entirely lawful activity." 425 U.S. at 773. The *Central Hudson* test, which was devel-

oped later (based, in part, on the penultimate footnote in the majority opinion in *Virginia Pharmacy*, *id.* at 771-72 n. 24), has led at times to results that are clearly inconsistent with the spirit of *Virginia Pharmacy* itself.

Most significantly, *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), illustrates the perils of utilizing a commercial speech standard that is as subjective as the *Central Hudson* test. In *Posadas*, the Court upheld Puerto Rico's restriction on advertising of casino gambling aimed at residents of Puerto Rico. Applying *Central Hudson*, the Court concluded that Puerto Rico's "substantial" interest in "reduc[ing] demand for casino gambling by the residents of Puerto Rico" was "directly advanced" by limiting the availability of such advertising to the inhabitants of Puerto Rico. *Posadas*, 478 U.S. at 341. The Court attempted to buttress its opinion in *Posadas* by contending that the "greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." *Id.* at 345-46.[6]

A major flaw in this analysis is that it can be employed by proponents of regulation in an effort to justify restrictions on a wide variety of commercial messages. To illustrate, numerous products—from foods high in fat,

[6] This argument has been widely criticized. *See, e.g.*, A. Kozinski & S. Banner, *Who's Afraid of Commercial Speech*, 76 Va. L. Rev. 627 (1990); M. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 Vand. L. Rev. 1433 (1990); P. Kurland, *Posadas de Puerto Rico v. Tourism Co.: "'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wonderous Pitiful"*, 1986 Sup. Ct. Rev. 1. It was also repudiated *in City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 762-63 (1988) ("[T]hat ['greater-includes-the-lesser] syllogism is blind to the radically different constitutional harms inherent in the 'greater' and 'lesser' restrictions. . . . [A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship.") (footnote omitted).

sugar, salt, or nitrates to large-engine cars—have been accused of creating dangers to the public welfare and, arguably, could be banned by Congress or state legislatures.[7] Accordingly, the state's interest in "discouraging" the use of any of these products could be characterized by supporters of regulation as "substantial." Furthermore, as in *Posadas*, proponents of regulation can be expected to contend that a ban on advertising such products would "directly advance" the state's interest in dissuading consumers from using them—in the hope that an extremely broad array of advertising would be left open to censorship.[8] It is clear, however, that this Court has not accepted such a broad interpretation of *Posadas*, as evidenced by its more recent decision on commercial speech in *Peel*, 496 U.S. 91.[9]

[7] *Cf. Friends of Earth v. F.C.C.*, 449 F.2d 1164, 1169 (D.C. Cir. 1971) ("The distinction [between cigarettes and gas-guzzling cars] is not apparent to us, any more than we suppose it is to the asthmatic in New York City for whom increasing air pollution is a mortal danger."), *cert. denied*, 436 U.S. 926 (1978).

[8] In addition, there is no evidence to support the view that a ban on advertisements would generally discourage the consumption of the advertised product or service. Advertising has been shown to have an effect on brand loyalty only.

[9] Although *SUNY v. Fox*, 492 U.S. 469, employs the *Central Hudson* analysis as well, it is perhaps best understood—and perhaps should have been analyzed—as a right of access case involving a rule of general applicability affecting many business activities in addition to commercial speech. *See Heffron v. International Society for Krisha Consciousness*, 452 U.S. 640 (1981) (state fair may require that sale or distribution of any merchandise on state fair grounds be licensed). Unlike Cincinnati's ordinance, the general ban on most commercial activities on campuses at issue in *SUNY v. Fox* did not directly discriminate against certain forms of speech. Rather, its broad purpose was to keep certain businesses out of university campus dormitories. Also, unlike streets, it is not at all clear that college dormitories fall into the category of a traditional public forum. *Cf. Perry Ed. Assn. v. Perry Local Educators Ass'n*, 460 U.S. 37, 44 (1983) (internal school mailboxes do not constitute a public forum).

A second flaw in the *Posadas* analysis (and the *Central Hudson* test) is that it has caused confusion among the lower courts.[10] Such inconsistencies are an inevitable consequence of asking individual judges to assess the "substantiality" of an interest and weigh it against the degree of impingement on otherwise protected speech.

Balancing tests, by their very nature, tend to promote unprincipled decision-making, confusion, and judicial inconsistency. As such, although "we will have ... balancing modes of analysis with us forever[,] ... those modes of analysis should be avoided where possible." A. Scalia, *The Rule of Law as A Law of Rules*, 56 U. Chi. L. Rev. 1175, 1187 (1989). "Balancing" tests such as the *Central Hudson* analysis too easily permit judges to "mistake their own predilections for the law." A. Scalia, *Originalism: The Lesser Evil*, 57 U. Cinn. L. Rev. 849, 863 (1989); *see also* Scalia, *Rule of Law*, 56 U. Chi. L. Rev. at 1178. Especially when dealing with First Amendment freedoms, "the use of ... traditional legal categories is preferable to the sort of ad hoc balancing that the Court" performs under the *Central Hudson* analysis. *Simon and Schuster, Inc. v. New York State Victims Crime Board*, 112 S. Ct. 501, 514 (1991) (Kennedy, J., concurring). The problems inherent in the *Central Hudson* balancing test could largely be avoided if truthful commercial messages concerning lawful products or services were accorded the same constitutional protection (and subject to the same regulation) as other forms of speech.

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[10] *Compare, e.g., Actmedia, Inc. v. Stroh*, 830 F.2d 957 (9th Cir. 1986) (state law prohibiting placement of alcohol advertising signs on shopping carts constitutional) *with National Advertising Co. v. Town of Babylon*, 900 F.2d 551 (2d Cir. 1990) (certain ordinances prohibiting maintenance of off-premises signs unconstitutional); *Ackerly Communications of Massachusetts v. City of Somerville*, 878 F.2d 513 (1st Cir. 1989) (ordinance prohibiting maintenance of off-premises sign boards unconstitutional).

B. The Original Understanding of the First Amendment, When Read with the Common Law of 1791, Confirms That Truthful Commercial Messages Are Entitled to Full First Amendment Protection.

This conclusion—that truthful messages about lawful products or services are entitled to full protection—is also consistent with the original meaning of the First Amendment.[11] The Press Clause, when read against the background in 1791, confirms that, while government may limit commercial messages concerning lawful products to avoid potentially false or misleading claims, such speech is not in other respects subject to a reduced level of constitutional protection.

"[T]he true meaning [of the freedom of the press] as understood *by the nation* at the time of its ratification" prohibits discrimination against commercia' communications merely because they are commercial. Letter of J. Madison to John G. Jackson (Dec. 21, 1821) *reprinted in* 9 *Writings of James Madison* at 70, 74 (G. Hunt, ed., 1819-36) (emphasis in original).[12] Indeed, it shows that the development of the concept of a free press and of a commercial, advertising-driven press were inextricably linked. V. Crane, *Benjamin Franklin's Letters to the Press, 1758-1775* xvi (1950) ("It was a commercial age, and it produced a commercial press."). As a result, the

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[11] Whether or not one believes that the text and history of the Constitution determine the outcome of a particular case, the original understanding of the Constitution's terms is without question *relevant* to any attempt to interpret the Constitution. *See, e.g., Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 247 (1985) (Brennan, J., dissenting); *Perpich v. Dep't of Defense*, 110 S. Ct. 2418, 2422-23 (1990).

[12] *See also White v. Illinois*, 112 S. Ct. 736, 744-48 (1992); (Thomas, J., concurring) (Sixth Amendment should be construed in a manner consistent with the Amendment's "text and history"); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1988) (discussing the "historical record" of the Full Faith and Credit Clause in order to discern its "original understanding").

modern distinction between "commercial" messages and other forms of speech would simply never have occurred to colonial Americans. At the same time, it is clear that the common law rules limiting misrepresentation survived the adoption of the Bill of Rights. Thus, the First Amendment permits the regulation of commercial messages concerning lawful products and services only to ensure that they are truthful and not misleading.

The strongest support for the view that truthful, nonmisleading speech about lawful matters is entitled to a full measure of constitutional protection is the text of the Press Clause itself, which does not distinguish between advertisements and other types of messages. Absent specific evidence to the contrary, then, it should be presumed that the original meaning of "the freedom . . . of the press" encompasses all elements of the press, including advertising. Indeed, there is much historical evidence demonstrating that the "press" which the Framers wanted to remain forever free included commercial advertisements.

Certainly, colonial Americans did not distinguish between the types of messages warranting protection from governmental interference. As one contributor writing under the pseudonym "Philalethes" declared in Boston's *Herald of Freedom* in 1788, Americans "are nurtured in the ennobling idea that to think what they please, and to speak, write and publish their sentiments with decency and independency on *every* subject, constitutes the dignified character of Americans." Boston Herald of Freedom, September 15, 1788 (emphasis added).[13]

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[13] *Quoted in* J. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* 19 (1988). When *The New-Hampshire Gazette* was launched in 1756, its publisher said that the paper would "contain Extracts from the best Authors on Points of the most useful Knowledge, moral, religious, or political Essays, and such other Speculations as may have a Tendency to improve the Mind, *afford any Help to Trade, Manufactures, Husbandry, and other useful Arts*, and promote the public Welfare in any Respect." New Hampshire Gazette, October 7, 1756, *quoted in* Smith, *supra*, at 49 (1988) (emphasis added). True to its word, the *Gazette*, like the other newspapers of its day, carried everything from price lists to political philosophy.

It is clear, moreover, that the "press" which the Framers specifically sought to protect encompassed communication concerning commercial matters. As Richard Henry Lee of Virginia, perhaps the leading Anti-Federalist, said in his demand for a bill of rights, "a free press is the channel of communication to *mercantile* and public affairs. . . ." Letter XVI, January 20, 1788, in *An Additional number of Letters from the Federal Farmer to the Republican* 151-53 (1962) (emphasis added).[14]

1. *Advertising was an integral part of the "press" in colonial America.*

In the press of the Eighteenth Century, editorial and advertising content were inextricably linked. For much of that era, newspapers did not generally use layout techniques or differences in typeface to provide a visual distinction between the two. K. Middleton, *Commercial Speech in the Eighteenth Century in Newsletters to Newspapers: Eighteenth-Century Journalism* 281 (D. H. Bond & W. R. McLeod, eds., 1977). Moreover, the standard colonial newspaper was almost half-filled with local advertising. L. Wroth, *The Colonial Printer* 234 (1938). To illustrate, in 1766 Hugh Gaine's *New-York Mercury* was 70% advertising, and 55% of the *Royal Gazette* consisted of commercial matter. A. Lee, *The Daily Newspaper in America* 32 (1937).

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[14] *Reprinted in Freedom of the Press from Zenger to Jefferson: Early American Libertarian Theories* 144 (Leonard Levy, ed., 1966). Among the goals of the first attempted colonial newspaper in 1690 was the promotion of "Business and Negotiations." PUBLICK OCCURRENCES, Both Foreign and Domestick, September 25, 1690, *quoted in* F. Presbrey, *The History and Development of Advertising* 119 (1929). This newspaper was suppressed by governmental authorities after its first issue.

The first daily newspaper in the United States was established in 1784 as a result of pressure for advertising space. When the *Pennsylvania Packet and General Advertiser* initially appeared, ten of its sixteen columns were filled with ads. F. Presbrey, *The History and Development of Advertising* 161 (1929). As with several other newspapers of the period, the name of this paper (as well as that of New York's first daily, *The New-York Daily Advertiser*), reflected the common understanding that commercial advertisements were as much a part of the news of the day as reports of government activity.[15] The front pages of the Boston, New York, and Philadelphia newspapers were devoted almost exclusively to advertising. F. Mott, *American Journalism A History: 1690-1960* 157 (1963) ("Most dailies in these years used page one for advertising, sometimes saving only one column of it for reading matter."); *see also* J. Wood, *The Story of Advertising* 85 (1958).

The majority of the ads which appeared in colonial newspapers would today be considered "commercial speech." Middleton, *supra*, at 277. ("The colonial press regularly carried reputable medical ads, as well as those for books, cloth, empty bottles, corks, and other useful goods and services."). Often newspapers simply carried long lists of general merchandise without prices or descriptions. Mott, *supra*, at 58. Without these ads, the vibrant colonial press so important to the Revolutionary cause would not have existed. During the Eighteenth Century, like today, "[a]dvertising represented the chief profit margin in the newspaper business." *Id.* at 56.

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[15] *See also* Presbrey, *supra*, at 154 ("Advertisements had as much interest as the news columns, perhaps greater interest, for they were more intimately connected with the readers' daily life than were the foreign items that made up so large a part of the news. Arrival of a new cargo of food or drink, or tools, likely was what the man, home from a reading at the coffee house or tavern, talked about at his fireside rather than the reception of a new envoy at some court in Europe.").

2. The colonial conception of a "free press" included advertising.

Given the prevalence of advertising in colonial America, it is not surprising that the very idea of a free press evolved in close connection with the development of advertising.[16] In fact, one of the best-known statements in defense of a free press was written in response to an attack on an advertisement printed by Benjamin Franklin. In 1731, Franklin printed an advertising notice for a ship's captain. The ad was not part of a newspaper; it was distributed as a stand-alone commercial handbill. The paper simply "propose[d] a commercial transaction," *Virginia Pharmacy*, 425 U.S. at 760, by seeking additional freight and passengers for the captain's ship. At the bottom of the ad was the note, "No Sea Hens nor Black Gowns will be admitted on any Terms." *An Apology for Printers* (1731), *reprinted in* 2 *Writings of Benjamin Franklin*, 172, 176 (1907).

This handbill outraged the local clergy (the "Black Gowns"), although it is unclear whether they were more offended by their exclusion from the pool of desirable passengers or from their placement in the same category as women of ill repute ("Sea Hens"). In response to attacks on the ad, Benjamin Franklin published his "Apology for Printers" which, at that time, was "[b]y far the best known and most sustained colonial argument for an impartial press." S. Botein, *Printers and the American Revolution in The Press and the American Revolution* 20 (B. Bailyn & J. B. Hench, eds., 1980). Originally published in the June 10, 1731, edition of the *Pennsylvania Gazette*, Franklin's "Apology" contended that "Printers are educated in the Belief that when Men

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[16] Although the first regularly published American weekly newspaper, the *Boston News-Letter* of May 1-8, 1704, also contained the first paid advertisements, it took about fifteen years for Benjamin Franklin and his brother James to come "into journalism and sow[ ] the seed of a free press and an expansion of advertising." Presbrey, *supra*, at 131; *see also* Mott, *supra*, at 11.

differ in Opinion, both Sides ought equally to have the Advantage of being heard by the Publick."[17] This incident illustrates that, at least to Franklin, the "Opinions" stated even in advertisements should be "heard by the Publick." Thus, America's first sustained defense of a free press, and of the very notion of a "marketplace of ideas," came in response to an attack on a classic example of commercial speech.[18]

One of the major precipitating events of the American Revolution also involved a defense of advertisements. The Stamp Act of 1765 taxed each newspaper—and imposed an additional two-shilling tax on each advertisement. "This was a heavy tax in proportion to the value of the item being taxed," and galvanized the colonial press against the British government. J. Lofton, *The Press as Guardian of the First Amendment* 2 (1980). The opposition of newspapers to the Stamp Act of 1765 was in large part, if not primarily, based on their concern that it encroached on the freedom of expression. A. Schlesinger, *Prelude to Independence: The Newspaper War on Britain 1764-1776* 70-82 (1966).[19] The repeal of the Stamp Act

[17] This echoed the sentiment in the libertarian *Cato's Letters*, published from 1720-1724 and widely circulated in the colonies, that "Whilst all Opinions are equally indulged, and all Parties equally allowed to speak their Minds, the Truth will come out." J. Trenchard & T. Gordon, 3 *Cato's Letters* 295 (1733). These letters were "the most popular, quotable, esteemed source of political ideas in the colonial period." C. Rossiter, *Seedtime of the Republic* 141 (1953). *Compare Abrams v. United States*, 250 U.S. 616, 630 (1919) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market") (Holmes, J., dissenting).

[18] John Stuart Mill expanded on this concept of a "marketplace of ideas" in *On Liberty* where he wrote that the "real advantage which truth has [is] that when an opinion is true, it may be extinguished once, twice, or many times, but in the course of ages there will generally be found persons to rediscover it, until [eventually] it has made such head as to withstand all subsequent attempts to suppress it." J.S. Mill, *On Liberty* (1859), *reprinted in Utilitarianism and Other Writings* 155 (1970).

[19] This concern rested to a certain extent on the history of stamp taxes in England. Such taxes had been introduced in that country

of 1765 one year after it had been enacted "was a powerful victory for an independent press and for advertising." Presbrey, *supra*, at 151.

Advertisements were not necessary to the press simply because the revenue they generated was required for newspapers to exist; they were thought to have independent value in educating and informing the reading public. As the prominent printer-historian Isaiah Thomas, editor of an ardently pro-Revolutionary newspaper, wrote:

> [Advertisements] are well calculated to enlarge and enlighten the public mind, and are worthy of being enumerated among the many methods of awakening and maintaining the popular attention, with which more modern times, beyond all preceding example, abound.

History of Printing in America with a Biography of Printers, and an Account of Newspapers (1810).[20]

3. *The Framers' political philosophy, which equated liberty and property, did not distinguish between commercial and noncommercial messages.*

The inextricable link between commercial and other speech reflects the Framers' political philosophy, which generally equated liberty and property rights. As one newspaper commentator put it, "Liberty and Property

to replace the failed system of licensing printers. Thus, their express purpose had been to control and cripple the press. F. Siebert, *Freedom of the Press in England, 1476-1776* 306-321 (1952) ("[T]he principal objective of the first Stamp tax (10 Anne, cap. 18, 1712) was the control of 'licentious, schismatical, and scandalous' publications.").

[20] *Quoted in* D. Boorstin, *The Americans: The Colonial Experience* 328, 415 (1958). Justice Blackmun echoed these words nearly two centuries later in *Virginia Pharmacy*, when he wrote:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

425 U.S. at 765.

are not only join'd in common discourse, but are in their own natures so nearly ally'd that we cannot be said to possess the one without the enjoyment of the other." Boston Gazette, February 22, 1768, *quoted in* Rossiter, *supra*, at 379. This philosophy was based on that of John Locke, who defined the "state of perfect freedom" as the ability of people "to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of nature, without asking leave, or depending upon the will of any other man." J. Locke, *Second Treatise on Government* ch. 2, § 4 (1790).

Proceeding from Locke's thesis, Cato wrote:

> By Liberty, I understand the Power which every Man has over his own Actions, and his Right to enjoy the Fruit of his Labour, Art, and Industry, so far as it hurts not the Society, or any Members of it, by taking from any Member, or by hindering him from enjoying what he himself enjoys . . .

2 *Cato's Letters* 244-45.

Without question, this was the guiding philosophy of the Framers. For example, George Mason's Virginia Declaration of Rights stated that among the natural rights of man was "the Enjoyment of Life and Liberty, *with the Means of acquiring and possessing Property*, and pursuing Happiness and Safety." Va. Declaration of Rights § 1, *reprinted in* H. Miller, *George Mason: Gentleman Revolutionary* 340 (1975) (emphasis added).

Given this outlook, the current distinction between advertisements and other parts of the press would never have occurred to the Framers. They accepted the importance of freedom of expression and its inextricable link with property rights, which Cato had articulated as follows: "This sacred Privilege is so essential to free Government that the Security of Property, and the Freedom of Speech, always go together." 1 *Cato's Letters* 965-103 (Essay No. 15, Of Freedom of Speech: That the Same is Inseparable From Publick Liberty, February 4, 1720).[21]

[21] Cato's articulation of the tie between property rights and free speech was enormously influential in colonial America. Smith, *supra*, at 25. In fact, Cato's *Essay on Free Speech*, first printed in America by Benjamin Franklin in 1722, contained the seed of the First Amendment's press clause. Cato's Essay contended that "Freedom of Speech is the Great Bulwark of Liberty; they prosper and die together." Cato's Letters No. 15, *quoted in* D. Bogen, *The Origins of Freedom of Speech and Press*, 42 Md. L. Rev. 429, 444 (1983). Madison lifted Cato's phrase for his original draft of the First Amendment, which provided that "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty shall remain inviolable." 1 Annals of Congress 434 (1789), *reprinted in* 5 *The Founders' Constitution* 128 (P. Kurland & R. Lerner, eds., 1987).

Eighteenth-century printers who published advertising-laden newspapers therefore believed that they were exercising the natural right to control their property. In fact, much of the opposition to the British Stamp Act of 1765 and the taxes it imposed on the press—including taxes on advertising—was based on their perceived offense to property rights. *See* Middleton, *supra*, at 280-81.

In keeping with this recognition that advertising was an inextricable part of the press whose freedom the Framers sought to guarantee, the text of the First Amendment draws no distinction between the commercial and noncommercial aspects of the press. The purpose of the Press Clause, as James Madison said when the First Amendment was reported out of the House select committee, was to "expressly declare" "the liberty of the press . . . to be beyond the reach of government." 1 Annals of Congress 738 (1789), *reprinted in* 5 *The Founders' Constitution* 129 (P. Kurland & R. Lerner, eds., 1987). There is simply no evidence that the First Amendment places "beyond the reach of government" just that part of it which contained political or other noncommercial speech.[22]

[22] In fact, the general theory of the First Amendment holding sway at the time applied it to much more than political speech. Among the reasons given by the Continental Congress to settlers in Quebec for the importance of the freedom of the press was "the

4. *The First Amendment did not displace the common law restricting false or misleading speech, which is not protected.*

That the "freedom of the press" includes advertisements does not mean, however, that false or misleading informative commercial speech is, or ever was, entitled to First Amendment protection. *See, e.g., Friedman v. Rogers*, 440 U.S. 1 (1979). The First Amendment was adopted against the background of a venerable common-law tradition prohibiting commercial misrepresentation. In the words of Sir William Blackstone, "every kind of fraud is equally cognizable ... in a court of law." W. Blackstone, 3 *Commentaries on the Laws of England* 431 (1768). Justice Story treated that "old head of equity," the law of misrepresentation, in great detail. *See* J. Story, *Equity Jurisprudence* § 191 (1836). He described the basic rule as:

> Where the party intentionally, or by design, misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or to cheat him, or to obtain an undue advantage; in every sense there is a positive fraud in the truest sense of the terms; there is an evil act with evil intent .... And the misrepresentation may be as well by deeds or acts, as by words; by artifices to mislead, as well as by positive assertions.

Story *supra* § 192; *see* W. Walsh, *A History of Anglo-American Law* 328-29 (1932) (tracing development of action of deceit from mid-fourteenth century).[23]

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advancement of truth, science, morality, and arts in general." Address to the Inhabitants of Quebec (1774), in B. Schwartz, 1 *The Bill of Rights: A Documentary History* 223 (1971).

[23] Similarly, the Court has consistently held that advertising promoting an unlawful product or service is unprotected. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973). This comports with the common law, which considered it a criminal offense to "procure, counsel, or command another to commit a crime." W. Blackstone, 4 *Commentaries on the Laws of England* 36 (1769) (defining an accessory before the fact); *Rex v. Higgins*, 2 East 5, 102 Eng. Rep. 269 (1801) ("A solicitation or inciting of another, by whatever means it is attempted, is an act done; and that such an act done with a criminal intent is punishable by indictment has been clearly established by ... several cases.").

Thus, the Court has correctly noted that there is "a distinction between commercial and noncommercial speech." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 506 (1978). Properly understood, however, that distinction should simply be as follows: the veracity of commercial speech may be policed, whereas the government's ability to regulate "false" or misleading political speech is far more constrained.[24] This distinction avoids the "dilution" which this Court has said would be "invited" were "a parity of constitutional protection for commercial and noncommercial speech alike" required. *Ohralik*, 436 U.S. at 556.[25]

There is no evidence that the First Amendment was intended to free advertisers to misrepresent their wares or to displace the common law regulating commercial transactions.[26] Thus, in defining misrepresentation, the legislature is carrying forward a common-law tradition

[24] *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) ("under the First Amendment there is no such thing as a false idea"); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (holding unconstitutional "forced speech" with respect to political speech). *But see Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) (false and defamatory speech may be punished because libelous).

[25] As such, regulation of false or misleading speech under laws such as the Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.* (1988), is not unconstitutional.

[26] This does not mean that the First Amendment left the common law entirely untouched and unaffected. Most notably, the Court has adopted the view that the First Amendment prohibited prosecutions for seditious libel. *See, e.g., Whitney v. California*, 274 U.S. 357, 372-78 (1927) (Brandeis, J., concurring). *See also* Smith, *supra*, at 7-8; D. Anderson, *The Origins of the Press Clause*, 30 U.C.L.A. L. Rev. 455, 510 (1983).

which the First Amendment did not displace. However, the First Amendment does forbid the government from restricting commercial messages for illegitimate ends under the pretext of promoting a vague and generalized concept of "fairness" in every commercial transaction. *See generally Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466. Nor would it permit an outright ban on all commercial communications on the grounds that they are somehow inherently misleading. *Cf. Virginia Pharmacy*, 435 U.S. at 766-69. Finally, as demonstrated below, it certainly would prohibit laws which discriminate against constitutionally protected publications merely because they contain commercial messages only—such as the ordinance at issue here.

II. BY DISCRIMINATING AGAINST CERTAIN PUBLICATIONS MERELY BECAUSE THEY ARE COMMERCIAL, THE CINCINNATI ORDINANCE VIOLATES THE FIRST AMENDMENT.

Under this analysis, Cincinnati's ordinance clearly violates the First Amendment because it places a special restriction on commercial messages for a reason other than to preserve their truth and veracity. The Cincinnati ordinance has nothing whatever to do with avoiding falsity. There is no contention in this case that Discovery Network's "expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." *Central Hudson*, 447 U.S. at 566 n. 9. Accordingly, the ordinance at issue should be subject to the same level of scrutiny as are regulations of fully protected speech; in other words, the Discovery Network's advertising circulars should be entitled to the same protection as are noncommercial messages. Employing this standard, the ordinance clearly fails because it rests on a content-based distinction that is entirely unrelated to the interests the city seeks to advance.[27]

[27] This is not to say that the City of Cincinnati does not have a legitimate interest in promoting the safety and beauty of its streets. The problem here is that the means by which the city has chosen to accomplish those goals are unlawful. This case is therefore different from *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1976), where the government sought to avoid the secondary effects of activities that could only be defined by reference to a certain kind of speech. The effects of the newsracks banned by Cincinnati's ordinance have nothing whatever to do with the content of the publications contained within the newsracks. *See Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2471 (1991) (state's interest in banning nude dancing arises from the "simple correlation" of such dancing with secondary evils, not from any relationship between the effects and "the expressive component of the dancing") (Souter, J., concurring).

This Court's case law clearly prohibits regulations of speech based on its content unless they serve a compelling state interest. *See, e.g., Burson v. Freeman*, No. 90-1056, slip op. at 15 (S. Ct. May 26, 1992) ("We agree that distinguishing among types of speech requires that the statute be subjected to strict scrutiny.") (Blackmun, J., plurality opinion).[28] Without question, Cincinnati's ordinance, on its face, restricts the distribution of certain forms of information.[29] It is not a "generally applicable economic regulation to which the press can legitimately be subject." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987). Rather, like the discriminatory taxes struck down as unconstitutional in *Arkansas Writers* and *Minneapolis Star and Tribune Co. v. Comm.*

[28] As Justice Kennedy pointed out in *Burson*, that a regulation is, arguably, "justified without reference to the content of the regulated speech" does not end the analysis. Slip op. at 2 (Kennedy, J., concurring) (emphasis and citations omitted). This case differs sharply from *Burson* because Cincinnati's justification for its ordinance is not "to protect another constitutional right"—*e.g.*, voting. *Id.* at 3. In addition, the paltry benefits to be accomplished by this restriction suggest strongly that the "problem" Cincinnati is seeking to address is insufficiently "compelling" to justify a content-based distinction.

[29] The ordinance at issue also impermissibly discriminates against certain types of noncommercial speech. To illustrate, Section 911-17 of the Cincinnati Municipal Code authorizes the distribution of newspapers of general circulation only via newsracks. This unconstitutionally discriminates against, for example, noncommercial local newspapers with a limited circulation.

of Revenue, 460 U.S. 575, 581 (1983), it impermissibly "targets a small group of" publications. *Arkansas Writers*, 481 U.S. at 229.[30]

As was the case with Arkansas's unconstitutional content-based tax on magazines, "[i]n order to determine whether a magazine is subject to [the ban]," Cincinnati's "'enforcement authorities must necessarily examine the content of the message that is conveyed.'" *Arkansas Writers*, 481 U.S. at 230 (quoting *F.C.C. v. League of Women Voters*, 468 U.S. 364, 383 (1984)). But "[s]uch official scrutiny of the content of publications as the basis for [a ban on access to newsracks] is entirely incompatible with the First Amendment's guarantee of freedom of the press." *Arkansas Writers*, 481 U.S. at 230.

The harmful implications of empowering the government to make content-based determinations of the kind required by this ordinance are easily demonstrated. It is one thing to "impos[e] on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful" in the context of commercial claims. *Zauderer*, 471 U.S. at 646. As demonstrated above, there is, at the very least, a common-law tradition supporting the undertaking of this task by the state. It is quite another, however, to permit government officials to regulate speech in any manner they choose based on a determination that it is commercial.

Indeed, it is often difficult "in the first instance [to] decid[e] whether the proposed speech is commercial or

[30] In fact, "the basis on which [Cincinnati] differentiates between [publications] is particularly repugnant to the First Amendment" because whether a publication is subject to the ban "depends entirely on its content." *Id.* "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). *See also Carey v. Brown*, 447 U.S. 455, 462-63 (1980). "Regulations which permit the Government to discriminate on the basis of content cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984).

noncommercial. In individual cases, this distinction is anything but clear." *Metromedia*, 453 U.S. at 536 (Brennan, J., concurring). The Framers understood, and *Virginia Pharmacy* explicitly recognized, that "no line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn." 425 U.S. at 765. Or, as Benjamin Franklin put it, the "Opinions" in advertisements "ought ... to have the advantage of being heard by the Publick," *see supra* page 18. It is impossible to predict the source of the next important idea; in today's consumer-oriented society it may well be contained in an advertisement. The Framers therefore extended the protection of the First Amendment to *all* of the "press." They recognized that what is material and economic is also political, and that commercial messages are often "indispensable to the formation of intelligent opinions as to how [our] system ought to be regulated or altered." *Virginia Pharmacy*, 425 U.S. at 765.

Moreover, even if a city official were able to categorize the speech in the various publications, he or she presumably would have to assess the overall character of the publication in order to decide if it were commercial. On what basis is a city official to judge the general nature of the publication? Would Discovery Network's circulars be constitutionally protected were they to contain two articles on "protected" topics? Three? Is there a requisite percentage of ads to editorial content? In this regard, it bears noting that today's newspapers generally strive for a ratio of roughly 70% advertising to 30% editorial content. *See* C. Fink, *Strategic Newspaper Management* 43 (1988). Other publications, such as magazines, often have an even higher ratio of ads to editorial page. *See, e.g.*, Hall's Magazine Reports (December 1991) (reporting that "Bride" magazine consisted of 77.6% advertisements during 1991).

Bureaucratic determinations as to whether a publication is "commercial" are problematic, especially where the implications of such a classification are the denial of

access to a vital means of distribution such as newsracks. For example, there are today many "shoppers" publications throughout the country. These papers often reprint some of the material that appears in traditional newspapers and repackage it with a large number of advertisements. While such "shoppers" are then distributed for the primary purpose of circulating their advertisements and to "propose a commercial transaction," they nevertheless contain some speech that is *fully protected* under any standard. Are they commercial or are they protected?

Finally, there is little principled distinction between Discovery Network's publications and the pre-printed advertising inserts commonly added to newspapers on Sundays or Wednesdays. These inserts are easily separated from the rest of the newspaper. Were this Court to permit bans on commercial circulars merely because of their content, it is not inconceivable that a government authority could try to ban such inserts on the grounds that they promote litter, harm the environment, and increase the demand for newsracks. Such a bar, if sustained, would seriously undermine the viability of the print press in this country.

CONCLUSION

The "freedom of the press" presupposes a vital and vibrant press. The Framers were practical men who viewed their liberties in a practical context. Many had first-hand experience with publishing and with advertising, and knew of the importance of advertising to the viability of the press. They scarcely would have adopted a regime limiting government regulation of political speech but permitting discrimination against the very messages which made that speech possible.

Yet that is the principle at stake in this case: whether truthful commercial messages about lawful products and services may be treated entirely differently from non-commercial speech merely on the basis of their commercial content. If such discrimination is permitted, then governmental officials may in the future assert supposedly "substantial" interests concerning health, safety, and other matters in a way that threatens to cripple important segments of the press in this country. This threat of censorship is too great, and the "benefits" to be gained from such serious restrictions on the press are too attenuated, to justify adopting such a rule.

This Court therefore ought to strike down the Cincinnati ordinance, affirm the decision of the Sixth Circuit, and confirm that truthful, non-misleading commercial messages concerning lawful products and services are entitled to the full protection of the First Amendment.

Respectfully submitted,

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